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No. 99-5739

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IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether 18 U.S.C. 844(i), which prohibits arson of a building or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a residence whose owner purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 178 F.3d 479. The opinion of the district court denying petitioner's motion for judgment of acquittal (Pet. App. 4a-8a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on one

count of arson, in violation of 18 U.S.C. 844(i); one count of making an illegal destructive device, in violation of 26 U.S.C. 5861(f); and one count of using a destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 9a. He was sentenced to 420 months' imprisonment, to be followed by five years' supervised release. Id. at 10a-11a. The court of appeals affirmed the arson conviction. Id. at 1a-3a.

1. Petitioner threw a Molotov cocktail into the home of his cousin, causing the home to be severely damaged by fire. Pet. App. 1a. The government's evidence at trial established that the home was supplied with natural gas produced outside the State; that an insurance claim was paid by an out-of-state insurer, and that mortgage payments on the property were being made to an out-of-state lender. Id. at 5a-6a. Petitioner was convicted of violating, inter alia, 18 U.S.C. 844(i), which establishes criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

2. On appeal, petitioner sought reversal of his arson conviction, arguing that Section 844(i) "exceeds Congress's power under the Commerce Clause * * * when applied to the destruction of a residence rather than a commercial establishment." Pet. App. 1a-2a. The court of appeals affirmed petitioner's conviction. It observed that "the owner of the residence purchased natural gas in

interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." Ibid. The court acknowledged that "these interstate connections are pretty slight for a single building," but it concluded that "proof of a small effect will satisfy the statute." Ibid.

The court of appeals explained that under this Court's decision in United States v. Lopez, 514 U.S. 549 (1995),

> any activity that substantially affects commerce may be regulated. Although living in one's own house is not commerce, the residential housing industry is interstate in character. Goods and materials for housing move across state borders; gas and electricity likewise; the financial and insurance markets that provide loans and spread risks have national if not international scope; arson can substantially affect all of these.

Pet. App. 2a. The court cited a Federal Bureau of Investigation report stating that 19,888 private residences were subjected to arson in 1997, and that the average "damage was a little more than $14,000 per residential arson," for a "total of approximately $280 million lost to residential arsons in 1997 alone." Id. at 3a. The court held that "[t]his collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct." Ibid.

The court of appeals stated that "[t]wo circuits have distinguished between commercial and residential property and held that the national government lacks the constitutional authority to punish arsons of residences." Pet. App. 2a (citing United States

v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), and United States v. Denalli, 73 F.3d 328 (11th Cir.) (per curiam), modified on other grounds, 90 F.3d 444 (1996)). The court stated that "[n]one of the arguments offered * * * by Pappadopoulos or Denalli persuades us that" prior circuit decisions upholding convictions for arson at private residences were erroneous. Pet. App. 3a. The court relied on this Court's decisions in McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232 (1980), and Goldfarb v. Virginia, 421 U.S. 773 (1975), to support its conclusion that the Commerce Clause authorizes Congress to regulate and protect residential property. See Pet. App. 3a.

ARGUMENT

Petitioner contends that the court of appeals' decision in this case conflicts with decisions of the Ninth and Eleventh Circuits, which have reversed convictions under Section 844(i) for lack of a sufficient commerce nexus in cases involving arson of residential property. Although the decision below is concededly in tension with the cases on which petitioner relies, no square conflict exists. We therefore do not believe that plenary review by this Court is warranted at present.

On September 28, 1999, however, this Court granted the petitions for certiorari in United States v. Morrison, No. 99-5, and Brzonkala v. Morrison, No. 99-29. Because the Court's decision in those consolidated cases may affect the proper resolution of the question presented here, the petition should be held pending this

Court's decision in Nos. 99-5 and 99-29, and then disposed of as appropriate.

1. In United States v. Russell, 471 U.S. 858 (1985), this Court upheld a federal conviction for arson involving a two-unit apartment building used as rental property. The Court recognized that Section 844(i)'s "reference to `any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." Id. at 859.[1] The Court held that "[t]he rental of real estate is unquestionably" an activity that affects interstate commerce, explaining that "[w]e need not rely on the connection between the market for residential units and `the interstate movement of people,' to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." Id. at 862 (footnote omitted) (quoting McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 245 (1980)). The Court went on to state that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." Ibid.

In United States v. Lopez, 514 U.S. 549 (1995), this Court, while invalidating a statute that regulated noncommercial activity

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[1] The Court also observed that "the legislative history [of the statute] suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." 471 U.S. at 862.

(possession of a gun in a school zone) and that lacked a jurisdictional element, recognized that statutes with jurisdictional elements are facially constitutional because the element "ensure[s], through case-by-case inquiry, that the [crime] in question affects interstate commerce." 514 U.S. at 561. As an example of such a statute, the Court cited former 18 U.S.C. 1202(a), which made it a crime for a felon to possess a firearm "in commerce or affecting commerce." Id. at 561-562. The Court explained that the jurisdictional element in former Section 1202(a) limited the statute's "reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Id. at 562.

Under Russell and Lopez, the application of the arson statute to the facts of this case is constitutional. Section 844(i)'s jurisdictional element ensures that the statute applies only to acts of arson that are shown to have a discernible effect on interstate commerce. And, considered in the aggregate, those acts have a substantial effect on interstate commerce. See Pet. App. 3a (FBI statistics show "a total of approximately $280 million lost to residential arsons in 1997 alone").

Petitioner argues (Pet. 11-18) that the "class of activities" approach does not apply to the arson statute because "simple arson" is not an "economic activity." When arson damages or destroys a building used in or affecting commerce, however, the crime is no longer simple arson. It is, instead, arson that has a particularized nexus to interstate commerce. By including a

jurisdictional element in Section 844(i), Congress defined a category of arson offenses that are connected to interstate commerce, and that accordingly may be considered as a class to establish a substantial effect under Lopez.[2]

2. Since Lopez, the courts of appeals have continued to use Russell's "class of activities" approach to determine the constitutional limits of the arson statute.[3] As the Eleventh

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[2] Petitioner also argues (Pet. 18-21) that the home in this case was not "used" within the meaning of Section 844(i). It does not appear that petitioner raised that claim in the court of appeals. See Pet. App. 1a-2a; Pet. C.A. Br. 9, 12. Petitioner's question presented in this Court is "whether, in light of *United States* v. *Lopez*, 514 U.S. 549 (1995), Section 844(i) may be constitutionally applied to the arson of real property that is not actively used in any commercial activity and that lacks any substantial connection with interstate commerce." Pet. I.

[3] See, e.g., United States v. Serang, 156 F.3d 910, 913-914 (9th Cir.) (upholding arson conviction and stating that "even if a single instance of the regulated activity has only a trivial effect on commerce, if the class of activities regulated substantially affects commerce in the aggregate, then the conduct falls within Congress's commerce power") (quoting United States v. Gomez, 87 F.3d 1093, 1096 (9th Cir. 1996)), cert. denied, 119 S. Ct. 627 (1998); United States v. Dascenzo, 152 F.3d 1300, 1302 n.6 (11th Cir. 1998) (upholding arson conviction; "Lopez, as a matter of constitutional law, only requires that the entirety of the `activity' regulated by the statute `substantially affect' interstate commerce"); United States v. Viscome, 144 F.3d 1365, 1369-1370 n.9 (11th Cir.) (upholding arson conviction; "[t]he conclusion that Lopez does not require an individualized finding of `substantial effect' to sustain a conviction under § 844(i)'s second prong is consistent with the holdings of several other circuits"), cert. denied, 119 S. Ct. 362 and 119 S. Ct. 435 (1998); United States v. Latouf, 132 F.3d 320, 327 (6th Cir. 1997) (upholding arson conviction; "[a]lthough these contacts standing alone may not have been sufficient to demonstrate the requisite `substantial' effect on interstate commerce, this court must consider these contacts in the aggregate"), cert. denied, 523 U.S. 1086, 1101 and 524 U.S. 920 (1998); United States v. McMasters, 90 F.3d 1394, 1399 (8th Cir. 1996) (affirming arson conspiracy conviction because "renting a house is the sort of economic activity that might, through repetition elsewhere, substantially

Circuit has explained, "Lopez does not require a substantial effect on interstate commerce to result from each individual criminal act or from the specific property involved in each criminal act," but only that the relevant class of activity -- "arson of property used in commerce or used in an activity affecting commerce" -- exert a substantial effect. United States v. Dascenzo, 152 F.3d 1300, 1303 n.6 (11th Cir. 1998). The courts of appeals have generally used the same "class of activities" approach in reviewing convictions under other federal criminal statutes containing jurisdictional elements.[4]

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affect interstate commerce"), cert. denied, 519 U.S. 1071, 1099 (1997); but see United States v. Corona, 108 F.3d 565, 570 (5th Cir. 1997) (upholding arson conviction but stating in dicta that "[w]ithout challenging the general thrust of the aggregation principle, we doubt that an effect as small as the cessation of natural gas service to a single household satisfies the constitutional requirement").

[4] See, e.g., United States v. Guerra, 164 F.3d 1358, 1361 (11th Cir. 1999) (affirming conviction for robbery in violation of the Hobbs Act, 18 U.S.C. 1951; "an individual defendant's conduct need not substantially affect commerce precisely because the Hobbs Act regulates general conduct -- robberies and extortion -- which in the aggregate affects commerce substantially"); United States v. Atcheson, 94 F.3d 1237, 1241-1243 (9th Cir. 1996) (reaffirming that "de minimis" effect on commerce is sufficient in individual Hobbs Act case), cert. denied, 519 U.S. 1156 (1997); United States v. Goodwin, 141 F.3d 394, 400 (2d Cir. 1997) (affirming conviction for money laundering, in violation of 18 U.S.C. 1956; "Lopez demands only that all of the regulated activity, taken in the aggregate, substantially affect interstate or foreign commerce"), cert. denied, 523 U.S. 1086 and 119 S. Ct. 190 (1998); cf. United States v. Hickman, 179 F.3d 230, 231 (5th Cir. 1999) (en banc) (per curiam) (upholding Hobbs Act convictions by evenly divided court; dissent states that "[w]e would hold that substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections between them"), petitions for cert. pending, Nos. 99-5614, 99-464, 99-6259, 99-6302.

As petitioner explains (Pet. 8-9), two courts of appeals have indicated that Congress may not proscribe the arson of a private home absent a "substantial" effect on commerce in the individual case. In United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995), the Ninth Circuit reversed an arson conviction involving a private home where "the government relied exclusively on one theory" to establish a commerce nexus: "that the * * * residence was `used in' or `used in an activity affecting' interstate commerce because it received natural gas from out-of-state sources." Id. at 525; see id. at 526 (the home's "only relationship to interstate commerce was that it received a supply of natural gas from a company that obtained some of that gas from outside the state").[5] The Ninth Circuit determined that

> in a case such as this, where Congress seeks to regulate a purely intrastate noncommercial activity * * * and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce [in the individual case].

Id. at 527. It held that "the receipt of natural gas * * * from out-of-state sources is insufficient as a matter of law to confer federal jurisdiction over the section 844(i) count." Ibid.; see id. at 528 ("Where the sole source of the interstate commerce

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[5] The jury in Pappadopoulos was instructed that "[a] building, including a private residence, is used in interstate commerce, or in an activity affecting interstate commerce, if it is supplied with natural gas which has moved in interstate commerce." 64 F.3d at 525 (quoting jury instructions).

connection is the receipt by a private home of natural gas * * *, federal jurisdictional requirements have not been met").

In United States v. Denalli, 73 F.3d 328 (11th Cir.) (per curiam), modified on other grounds, 90 F.3d 444 (1996), the Eleventh Circuit reversed an arson conviction involving a private home where the only evidence of a commerce nexus was that the homeowner "maintained an office in his private residence equipped with a personal computer" that he used to print memoranda for his job in an international corporation. 73 F.3d at 330. The court of appeals described the computer and the circumstances of its use:

> [The company] did not require [the homeowner] to maintain an office at home, and it did not require him to create the memoranda at home. [The] computer was not linked to any [company] computer. It was not equipped with a modem. It had no link to interstate phone lines or other interstate connections. The memoranda were not incorporated by disks or other electronic means to any [company] computers. [The homeowner] would print the memoranda on his personal printer and physically carry them to employees at [the company]. He conducted no further activity for [the company] at his residence that affected interstate commerce.

Id. at 330-331. Based on that evidence, the court held that "[n]o substantial effect on interstate commerce was proved." Id. at 331.

Neither Pappadopoulos nor Denalli squarely conflicts with the decision below. In Pappadopoulos, the only commerce nexus was the receipt of interstate natural gas, while in this case the court of appeals relied in addition on the out-of-state mortgage and insurance policy. In Denalli, the only commerce nexus was the stand-alone computer; the government did not rely on evidence

concerning interstate utilities, a mortgage, or insurance.[6] And any disagreement among the courts of appeals regarding the precise scope of the arson statute is of slight importance in light of the broad general agreement as to the applicable constitutional principles. See notes 3 and 4, supra.

3. For the foregoing reasons, the petition for certiorari does not warrant plenary review by this Court. The appropriate disposition of this case may be affected, however, by the Court's decision in United States v. Morrison, No. 99-5 (cert. granted Sept. 28, 1999), and Brzonkala v. Morrison, No. 99-29 (cert. granted Sept. 28, 1999). Those consolidated cases present the question (inter alia) whether 42 U.S.C. 13981, which creates a private right of action for victims of gender-motivated violence, is a permissible exercise of Congress's power under the Commerce Clause. The Court's decision in those cases may clarify the extent to which federal regulation of violent private conduct may be based upon the anticipated effects of such conduct on the national economy. The petition in this case should therefore be held pending this Court's decision in Nos. 99-5 and 99-29, and then disposed of as appropriate.

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[6] See Belflower v. United States, 129 F.3d 1459, 1461-1462 & n.4 (11th Cir. 1997) (per curiam) ("Denalli simply seems to represent the unusual and rare case envisioned by the Supreme Court when it recognized that `perhaps not every private home' will fall within the scope of § 844(i)"), cert. denied, 524 U.S. 921 (1998).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in United States v. Morrison, No. 99-5 (cert. granted Sept. 28, 1999), and Brzonkala v. Morrison, No. 99-29 (cert. granted Sept. 28, 1999), and then disposed of as appropriate.

Respectfully submitted.

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